Supreme Court, U.S.
FILED
JUN 6 1994
OFFICE OF THE CLERK

No. 93-1570

In The

Supreme Court of the United States

October Term, 1993

PREFERRED COMMUNICATIONS, INC.,

Petitioner,

vs.

CITY OF LOS ANGELES and
DEPARTMENT OF WATER AND POWER,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITIONER

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REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Preferred Communications, Inc. (hereinafter "Preferred") hereby replies to respondents City of Los Angeles and the Department of Water and Power's (hereinafter jointly referred to as "City") Brief for Respondents in Opposition (hereinafter "City Brief"). Petitioner sees no need to burden the Court with detailed discussions of the first and sixth points argued by the City, but will respond to the four others.[1] The City's claim that the questions presented here were not raised below is simply wrong, its argument that the matter should be left to state court is disingenuous, and its points regarding standing (raised here and in its Cross-Petition[2]) are both legally and factually baseless.

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[1] The City's first point, that there is no conflict among circuits, is irrelevant. Petitions may be granted where a lower court has decided an important question of federal law which should be settled by this Court. Rule 10, Rules of the Supreme Court. Moreover, as pointed out by the Amici Curiae, a conflict does exist among circuits as to the appropriate constitutional standard to apply to cable franchising. *See*, Brief of Amicus Curiae at 13-14, and n.12 and 13.

The City's sixth point, arguing the merits of the Ninth Circuit's decision to approve the NOS (City Brief at 13-17), has been touched on throughout Preferred's Petition (*see, e.g.*, Petition at 19-22 and n.30 and 33). However, a full argument is more appropriately left for a brief on the merits. *See e.g., Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974).

[2] The City filed a Conditional Cross-Petition For a Writ of Certiorari, Case No. 93-1759, on May 5, 1994 (referred to herein as "Cross-Petition"). Plaintiff does not, in general, oppose the City's cross-petition, although, for the reasons set forth herein at point 3, there is no reason for the Court to grant certiorari on the question of standing. While the Court will assess the

None of the points raised by the City is a persuasive reason to deny Preferred's petition. This case provides a valuable opportunity for this Court to clarify the First Amendment principles applicable to municipal franchising of cable television – an area of vital importance to both the cable press and, as the City concedes (Cross-Petition at 19), to municipalities themselves.

DISCUSSION

1. The Questions Presented Are Not Being Raised For The First Time Here. The City's argument that Preferred did not raise below the issue of cable operators using rights-of-way owned by utility companies – rather than ones owned by the City – is simply wrong. Preferred has raised this point throughout the litigation, at both the trial and the appellate levels.

For example, in opposing a 1988 motion for partial summary judgment, Preferred made the point very plainly:

> . . . Plaintiff does not seek access to the use of public property for the purposes of speech. . . . Plaintiff only seeks access to the communication space on utility property . . .

(CR 193, 1-2.) The same argument was made by Preferred again and again as the case progressed at the trial level.[3] Apparently the District Court did not find the issue of sufficient legal significance to address directly in its rulings, choosing to resolve the matter on different grounds. This erroneous conclusion by the lower court, however, should not cause Preferred to lose its right to address the issue at the appellate level.

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petitioner's standing as a matter of course, the record is sufficiently clear that the Court need not direct any more attention to this issue than is usual in any case.

[3] *See, e.g.*, CR 123 at 20, n. 15; CR 343 at 8 and n.2; CR 456 at 2, n.3.

At issue here is not a question of what the facts are, but rather what is the correct law to apply to those facts.[4] If, after resolving the legal issues, the Court believes that the factual dimensions of the questions presented were not fully resolved by the District Court, there is no reason that the Court cannot either resolve them or remand the matter for further proceedings consistent with its opinion. Such a procedure is regularly followed by this Court. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983).

The City's further argument that the Court should "refrain from addressing issues not raised in the Court of Appeals" (City Brief at 6) is highly misleading, since Preferred *did* raise this issue in the Ninth Circuit, at several points.[5] Indeed, the City specifically responded to the point in its own arguments to the appellate court.[6] The Ninth Circuit's failure to address the issue does not preclude this Court from doing so.

2. The Questions Presented Involve the Application of Federal Constitutional Law. The City attempts to belittle the federal questions involved in this litigation, apparently hoping that the Court will ignore the fact that the case, including the questions presented here, concern

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[4] This Court frequently grants certiorari to determine the application of constitutional principles to factual situations. *See, e.g., Michigan v. Long*, 463 U.S. 1032 (1983) and the many other cases applying the Fourth Amendment to varying search and seizure situations.

[5] Brief of Appellant in Case No. 91-55625 (filed 9/13/91) at 7, 29, 35, and 36, n.73; Preferred's Reply/Opposition Brief in Cases No. 91-55625 and 91-55665 (filed 3/9/92) at 1, n.2 ("[Preferred] seeks only to receive 'public utility service' over *utility* easements which happen to be co-located with City right-of-way easements") and at 18, n.28.

[6] *See, e.g.*, Reply Brief of Appellees/Cross-Appellants (filed at the Ninth Circuit 4/6/92) at 2, n.1.

the federally mandated First Amendment rights of members of the press. Whatever the state statutes provide,[7] it is the responsibility of the federal courts to interpret how federal law and constitutional principles should be applied.[8] That is why this case has been before the *federal* courts, including this one, for the last 10 years.

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[7] Preferred disagrees with the City's argument that the statutes are in conflict. The supposed conflict raised by the City can generally be resolved by reading the term "franchise" as it is defined in the federal Cable Act, *i.e.*, to include a "permit, license, resolution . . . " (47 U.S.C. §522.9), issuable to those purported to abide by appropriate police power (as opposed to the contractual power resulting from the "crown monopolies" selectively granted by the discretionary and standardless municipal franchising process).

[8] The City's argument that DWP's poles are outside the scope of the questions presented is a red-herring. The issue here is how the City controls cable via controlling access to its streets and rights-of-way, not via access to the utility poles owned by the DWP, which has its own easements over public and private property for the purpose of providing public utility services. Indeed, the record shows that DWP *has* dedicated its poles to use by cable operators, just as privately-owned utility companies have, providing access to any cable company that obtains "permits, licenses or grants" required by city authorities. (CR 468, Exh. 6 at ¶10; and see Petition at 7 and n.6). The only difference for the few solely-owned DWP poles not also used by telephone, is that the rates, as opposed to such issues as safety, are not regulated by the state Public Utilities Commission. Moreover, DWP is a signator of the Southern California Joint Pole Agreement, which mandates that when poles are jointly-owned and used by power and telephone companies (which includes the vast majority of all utility poles), the telephone company is to contract with and provide space for cable operators. Thus, since in most instances DWP's poles are jointly-owned, cable television wires located on DWP poles are generally located in telephone company space, not in DWP-controlled space.

Preferred only asks this Court to deal with state law to the extent it is required to insure the protection of its free speech and press rights. Such a challenge is clearly within the bailiwick of this court, the final arbiter of all matters of federal law.[9]

3. Preferred's Standing Has Been Clearly Established. The City, in both its opposition brief and its own Cross-Petition, disputes Preferred's standing to challenge the City's franchising process. Contrary to the City's assertion, the Ninth Circuit's affirmance of Preferred's standing is legally and factually well-grounded, and the decision does not conflict with other circuits.

The City asserts that the relevant injury for standing purposes is Preferred's "inability to engage in the First Amendment activities of a cable operator" in Los Angeles. (Cross-Petition at 12.) Publishing by cable is, of course, Preferred's *ultimate* goal, but the City errs in analyzing standing solely in terms of that goal. Contrary to the City's assertions, Preferred need not prove that it will, ultimately, succeed in constructing and operating a cable television system at a profit in South Central Los Angeles as a prerequisite to maintaining this litigation.[10]

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[9] The outcome of many cases addressed by this Court turn in part on state law, but only after the Court has provided the necessary clarification of federal law, and determined the applicable constitutional principles. The City's argument that this Court's decision would not provide guidance to courts outside California ignores the existence of the federal pole attachment statute. *See*, Petition at 24-25.)

[10] As the Ninth Circuit ruled in *Preferred I*:

> PCI's action challenges the auction process itself. It has been barred from access because of its refusal to enter the bidding process and abide by the City's numerous conditions. It follows that PCI clearly alleges a real injury, fairly traceable to the challenged action of the City. If PCI is right on its First Amendment claim as we have framed it, the City has wrongfully subjected PCI to a process that fails to

Preferred's standing to challenge the City's franchising process is clearly established by the numerous "lost opportunity" cases.[11]

In *Bakke*, for example, contrary to the City's argument here, the Court did *not* require the plaintiff to demonstrate that he was likely to graduate medical school, or pass his state medical certification examination, or have a profitable medical practice (though these were undoubtedly Bakke's *ultimate* goals). Those questions relate to relief, not standing. 438 U.S. at 280 n.14.[12]

Where a challenged government practice is an absolute barrier (*i.e.*, a necessary although not necessarily sufficient condition) to the plaintiff's proceeding toward an ultimate goal, the critical standing requirement is intent on the part of the plaintiff to seek the opportunity involved. The record here shows that Preferred clearly had such intent. *Preferred III*, 13 F.3d at 1330 (*see, e.g.*, CR 174, Ex. 3 at 3; CR 191, ¶2; CR 197, §2.) Thus the Ninth

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conform to the requirements of the First Amendment. This affords PCI standing.

754 F.2d at 1402-03.

[11] *See, e.g., Regents of the University of California v. Bakke*, 438 U.S. 265, 280 n.14 (1978) ("*Bakke*"); *Bryant v. Yellen*, 447 U.S. 352, 366-67 (1980); *Preston v. Heckler*, 734 F.2d 1359, 1364-66 (9th Cir. 1984); *Legal Aid Society v. Brennan*, 608 F.2d 1319, 1335 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). *See also*, Tribe, *American Constitutional Law*, §3-18 (2d ed. 1988) (standing exists where lack of government permit denies plaintiff the "opportunity to persuade others to support desired project").

[12] *See also, CC Distributors, Inc. v. United States*, 883 F.2d 146, 150 (D.C. Cir. 1989) ("Plaintiff suffers a constitutionally cognizable injury by the loss of an *opportunity to pursue a benefit* . . . even though the plaintiff may not be able to show that it was *certain to receive* that benefit had it been accorded the lost opportunity" (emphasis in original)); *Solon Automated Services, Inc. v. United States*, 658 F.Supp. 28, 31 (D.D.C. 1987) (rejecting requirement that a plaintiff show it had a "substantial chance" of winning properly-conducted bidding procedure).

Circuit again confirmed Preferred's standing on the grounds that it had a "concrete stake in the litigation" and the invalidation of the monopoly franchising process "will have increased [Preferred's] ability to compete for the franchise, despite its inability to prove it ultimately will be awarded one." *Preferred III* at 1330-31.

The Ninth Circuit relied on *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502 (9th Cir. 1988). In that case, the court found standing for film producers who sought government certification of their films to aid in their subsequent potential distribution to foreign countries, even though foreign distribution would remain quite uncertain. The court noted the long line of cases finding standing from "a cognizable injury to [plaintiff's] ability to compete for benefits." *Id.* at 506-08.[13]

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[13] *See also, Pacific Legal Foundation v. State Energy Resources, etc., Comm'n*, 659 F.2d 903, 914-15 (9th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982) ("It is sufficient that the utilities intend to proceed if the statutes are invalidated"); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977); Tribe, *supra*, at §3-18 at 132-33 (a contrary rule would be unworkable since excluded groups would be faced with a Catch 22: the more severely and successfully exclusionary a challenged scheme is, the more difficult to find persons willing to provide funding or other participation prior to resolution of the challenge).

Indeed, the record demonstrates that a grant of governmental authorization would put Preferred in a far better position to obtain financing and consummate contracts. (CR 191, ¶¶15-19; CR 199, ¶6; CR 200, ¶¶2-5; CR 201, ¶¶8-9.)

In any event, even if the City's legal analysis were completely correct, its description of the record is inaccurate. The City's characterization of Preferred as having no greater interest in resolving the constitutionality of the City's cable franchising procedures than any member of the "world at large" (Cross-Petition at 13) defies the record. Among other things, Preferred's principals have spent $200,000 and 6,000 hours specifically seeking governmental authorization to engage in cable

Nor can a contrary inference fairly be drawn from Preferred's purported failure to take preparatory steps. (City Brief at 12; Cross-Petition at 10.) Since the City has elected to allow only one cable television company within South Central Los Angeles, *no* amount of planning would have made any difference in Preferred's attempts to obtain legal authorization. The City urges a legal regime where plaintiffs must expend large sums "planning" for no purpose other than a paper record directed toward standing. The law does not require such a charade.[14]

Contrary to the City's contention in its Cross-Petition, the Ninth Circuit's decision below is not in conflict with the Eighth Circuit's opinion in *Nor-West Cable Communications v. City of St. Paul*, 924 F.2d 741 (8th Cir), *cert. denied*, 111 S.Ct. 2853 (1991), since, as the Ninth Circuit noted below, the instant case is clearly distinguishable from *Nor-West*. In *Nor-West*, the Eighth Circuit relied upon a specific jury finding that the plaintiff "never intended to build a second cable system" (924 F.2d at 747-48), while

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television activities in Los Angeles. That alone sets them apart from members of the general public.

[14] Indeed, the law frequently excuses otherwise necessary actions, where it is demonstrated that such actions would be futile. "The law should not be construed idly to require parties to perform futile acts or to engage in empty rituals." *Northern Heel Corp. v. Compo Industries, Inc.*, 851 F.2d 456, 461 (1st Cir. 1988). *See also, Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 120 n.15 (1969) (antitrust damages available even where no patent license requested, if request would have been futile); *Hoehne v. County of San Benito*, 870 F.2d 529, 535 (9th Cir. 1989) (resubmission of development plan unnecessary before suit if facts demonstrate futility); *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 105-07 (D.C. Cir. 1986) (exhaustion of administrative remedies unnecessary where futile); *In Re Bank-America Securities Litigation*, 636 F.Supp. 419, 422 (C.D. Cal. 1986) (demand prior to filing derivative action unnecessary if futile, noting that "the law abhors useless acts").

the facts here support a different conclusion. *Preferred III*, at 1329.[15]

This case has been pending for over ten years. It has been over eight years since the Ninth Circuit's initial decision in *Preferred I*. During all of that time, the City proceeded on its way with its monopoly cable policy. The City makes the somewhat twisted argument that this passage of time has weakened whatever standing Preferred once had, since certain aspects of the City's franchising practice have changed since 1983. (City Brief at 16, n.13.) There is no indication presented, however, that the City intends to make any change to its manner of granting franchises via a discretionary auction process – the aspect of its program specifically raised in the instant Petition.[16] It has not, like the City of Sacramento, abandoned its monopoly policy in favor of an

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[15] Since the Eighth Circuit's analysis in *Nor-West* lumps intent and financial capability together, it is somewhat difficult to identify the precise basis for its holding. It may be significant for standing purposes that the plaintiff therein did not challenge any of the particulars of the monopoly franchise process, but rather simply demanded a second franchise. 924 F.2d at 743-44. *Compare, Preferred I* at 1402-03.

[16] Moreover, the City's example of how its program has changed is highly misleading, to say the least. The City implies that after the 1984 Cable Act was passed, it no longer considered the programming that franchise applicants intended to offer. (City Brief at 16, n.13.) However, in its June 1986 "Request for Renewal Proposals" (*i.e., after* the 1984 Cable Act), the City specifically required that all cable operators seeking to renew their franchise provide detailed lists of every channel of programming offered on their current systems and every channel the operator intended to offer in the larger systems required by the City if the franchise were renewed. (CR 303, Exh. HH, 115-117.) Clearly, the City did *not* abandon its practice of requiring programming information even after the Cable Act precluded its use. To date, no competition has been allowed by the City in this form of the press.

ordinance prescribing the rules applicable to all who ask for and receive cable television licenses.

The requisite adversity between the parties clearly exists in this action: PCI would benefit from decision in its favor.

Respectfully submitted,

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